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No. 06-83

FILED
SEP 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MOHAMMED HUSSAIN, PETITIONER

v.

JIM NICHOLSON, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly awarded summary judgment against petitioner on his claims that he was subjected to actionable discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 435 F.3d 359. The memorandum opinion of the district court (Pet. App. A18-A59) is reported at 344 F. Supp. 2d 86.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2006. A petition for rehearing was denied on April 19, 2006. The petition for a writ of certiorari was filed on July 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Mohammed Hussain, an Indian Muslim, served as a physician at the Washington, D.C. Veterans Affairs Medical Center from 1978 until 2003. Pet. App. A20, A26. He held the position of Assistant Chief of Radiation Therapy until 1997, at which point his supervisor retired and he was appointed Acting Chief of the Radiation Therapy Service. *Id.* at A20. Although not accompanied by a pay raise, that new role entailed additional administrative duties. In addition, as Acting Chief, petitioner reported directly to the hospital's Chief of Staff, Ross Fletcher. *Ibid.* Petitioner sought to make his appointment permanent, but the hospital declined to do so. *Id.* at A21.

In September 2000, the hospital decided to merge the Radiation Therapy Service with the Imaging Service. Pet App. A21. The merger caused petitioner's unit to lose its status as an independent "service," instead becoming a "division" within the newly formed Radiology Service. *Ibid.* The hospital also decided to appoint the current Chief of the Imaging Service, Klemens Barth, as head of the Radiology Service. *Ibid.* As a result, while petitioner retained his title, pay, and job responsibilities, he now reported to Dr. Barth, rather than reporting directly to Dr. Fletcher. *Ibid.*

On November 29, 2000, petitioner filed an informal Equal Employment Opportunity complaint. Pet. App. A21. He alleged that the hospital had discriminated against him on the basis of race, age, religion, and national origin by (1) failing to permanently appoint him Chief of Radiation Therapy, and (2) effectively demoting him in the merger. *Id.* at A21-A22.

In January 2001, the hospital referred petitioner to a Veterans Administration "Peer Review Panel" to address his possible involvement in events that had resulted in a malpractice claim against the hospital. Pet. App. A22. Dr. Fletcher submitted a letter in petitioner's defense, and the panel found that petitioner had not deviated from the appropriate standard of care. *Id.* at A22-A23. The panel therefore decided not to report petitioner to a national malpractice database. *Ibid.*

On February 14, 2001, petitioner filed a formal charge of employment discrimination with the Equal Employment Opportunity Commission. Pet. App. A23. He reasserted the allegations of his previous informal complaint, and further alleged that the hospital had submitted his name to the Peer Review Panel in retaliation for that earlier filing. *Ibid.*

Meanwhile, reorganization at the hospital continued. In July 2001, the hospital hired an African American woman, JoAnn Manning, as a Radiation Therapy staff physician. Pet. App. A23. In December 2002, the hospital appointed Dr. Manning as Chief of Radiation Therapy, and returned petitioner to his previous title of Assistant Chief. *Id.* at A24. While some of his administrative responsibilities shifted to Dr. Manning, petitioner's compensation and duties did not change. *Ibid.*

In between Dr. Manning's hiring and her promotion, petitioner had received two unfavorable performance reviews from the hospital. The first, in October 2001, rated petitioner as "satisfactory" and stated that "many issues have arisen regarding [petitioner]." Pet. App. A24. The second, in August 2002, rated petitioner "low satisfactory" and stated that petitioner had failed to "provide effective leadership for the division." *Ibid.* In February 2003, petitioner filed suit against the hospital

in the United States District Court for the District of Columbia, raising a variety of claims, including claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A4, A26.

In June 2003, the hospital became concerned that petitioner had been failing to conduct adequate follow-up evaluations with his patients. Pet. App. A24-A25. The hospital therefore renewed petitioner's clinical privileges for only three months, as opposed to the typical two years. *Id.* at A25. The hospital also began to require special documentation and review of petitioner's patient visits. *Ibid.* Based on that review, the hospital became concerned that petitioner was simply copying other physicians' diagnoses without independently confirming them. *Ibid.*

In August 2003, the hospital informed petitioner, then on medical leave, that it would extend his clinical privileges for one month, but that he would be required to fully comply with standard treatment protocols. Pet. App. A25. Petitioner sought permission to extend his medical leave, and provided the hospital with a doctor's note stating that his emotional state would not allow continued exposure to the hospital's "very stressful work environment." *Id.* at A25-A26. The hospital informed petitioner that it would not approve his request to extend his leave without additional medical documentation, and subsequently placed him on "Absent Without Leave" status. *Id.* at A26. In September 2003, petitioner opted for early retirement. *Ibid.*

2. In November 2003, petitioner filed a second amended complaint, narrowing the scope of his suit to only Title VII claims. Pet App. A4, A26. He alleged that the hospital had failed to promote him based on race, religion, and national origin; that he had been sub-

ject to a hostile work environment; that he had been retaliated against for protected activity; and that he had been constructively discharged. *Id.* at A4. The district court set aside a six-month window for discovery, but petitioner failed to take any discovery during that period. *Ibid.*

In June 2004, after the close of discovery, the government filed a motion for summary judgment. Pet. App. A26. More than one month later—and three and a half months after discovery had closed—petitioner, represented by new counsel, moved to reopen discovery. *Id.* at A26-A27. Finding that the lack of discovery was due to the neglect of petitioner's prior counsel, the court denied the motion. *Ibid.*

The district court subsequently granted the government's summary judgment motion. Pet. App. A18-A59. The court examined at length the evidence relating to petitioner's Title VII claims. *Id.* at A28-A58. Regarding his failure to promote claims, the court found that, "[v]iewing the evidence in the light most favorable to [petitioner]," the hospital's "decisions not to appoint him as either Chief of Radiation Therapy or Chief of Radiology were rooted in valid and documented concerns regarding his performance and not in any animus towards his race, religion, or national origin." *Id.* at A48. The court also found no basis for his hostile work environment and constructive discharge claims. *Id.* at A57-A58.

The district court also rejected petitioner's claim that he had been subjected to 12 acts of retaliation.[1] The

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[1] The 12 acts alleged were: (1) "nonselection for Chief of Radiology Therapy," (2) reporting petitioner to a national malpractice database, (3) "denial of special pay," (4) "denial of clinical privileges," (5) subjecting petitioner to "scrupulous monitoring," (6) "poor performance evaluations," (7) "denial of medical leave," (8) "intentional delay in

court found that 11 of the alleged retaliatory acts did not rise to the level of adverse employment actions, and that four of those 11 had not actually occurred as petitioner claimed. See Pet. App. A50-A57. In a footnote, the district court rejected, as contrary to circuit law, petitioner's contention that "an adverse action is 'any action reasonably likely to deter protected activity.'" *Id.* at A49 n.22. As for the final alleged retaliatory act—promoting Dr. Manning over petitioner—the court determined that petitioner could not show that the hospital's proffered legitimate, nondiscriminatory reasons were pretexts for retaliation. *Id.* at A54-A55.

3. Petitioner appealed both the denial of his motion to reopen discovery and the grant of summary judgment in favor of the government. The court of appeals concluded that the district court's discovery ruling was not an abuse of discretion, because the necessity for the continuing discovery was primarily due to the lack of diligence by petitioner's original attorney. Pet. App. A8. As the court explained, "a party who voluntarily chooses his attorney 'cannot . . . avoid the consequences of the acts or omissions of this freely selected agent.'" *Ibid.* (citation omitted).[2]

The court of appeals also agreed with the district court that summary judgment was proper, because plaintiff "failed to present any triable Title VII claims."

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forwarding supervisor's letter for retirement purposes," (9) failing to provide written retirement options and denying petitioner's counsel the opportunity to ask questions at a retirement meeting, (10) "denial of access to official personnel file," (11) "Harassment/Threats of Termination," and (12) "Harassment/Fostering Insubordination." Pet. App. A49-A50 & n. 23 (internal alterations omitted)

[2] Judge Rogers concurred on the separate ground that petitioner could not show sufficient prejudice. Pet. App. A13-A17.

Pet. App. A13. With respect to petitioner's retaliation claims, the court of appeals specifically noted that petitioner had not directly challenged the district court's determination that none of the 12 acts of retaliation he had alleged was actionable. *Id.* at A11-A12. Instead, petitioner had elected to argue on appeal that "the twelve alleged retaliatory acts, when combined, created a hostile work environment and constituted constructive discharge." *Id.* at A12. The court of appeals determined that no reasonable jury could reach such a conclusion and that summary judgment was therefore warranted on that claim. *Id.* at A12-A13.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the court of appeals' decision conflicts with *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). That contention is without merit and does not warrant review. *Burlington Northern* has no bearing on any issue that petitioner presented to the court of appeals or that was decided by that court.

In *Burlington Northern*, the Court held that Title VII's anti-retaliation prohibition is not limited to employment actions that affect the terms and conditions of employment. 126 S. Ct. at 2412-2413. Rather, the anti-retaliation prohibition extends to any action that a "reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citation omitted).

Petitioner contends that the court of appeals' decision conflicts with *Burlington Northern* because "[u]nder *Burlington*, the enumerated acts that the Court of

Appeals deemed not to be adverse actions within the meaning of Title VII are now actionable." Pet. 10. In fact, however, the court of appeals made no determination on whether the individual acts alleged by petitioner amounted to actionable retaliation, because petitioner failed to raise that issue on appeal. See Pet. App. A11-A12 (noting that the district court had made findings with respect to those acts, but that petitioner had declined to "respond[] to these findings directly"). Petitioner instead elected to advance an alternative theory of retaliation on appeal: that even if the alleged acts were not individually actionable, "when combined, [they] created a hostile work environment and constituted constructive discharge." *Ibid.*; see Pet. C.A. Br. 42 ("The Trial Court Erred by Failing to Recognize [petitioner's] Hostile Work Environment and Constructive Discharge Claims, based on Retaliation."); *id.* at 42-47 (stating that "[a]n adverse action is defined as 'any action reasonably likely to deter protected activity,'" but failing to argue that the district court erred in finding that individual retaliatory acts alleged by petitioner were not adverse actions). The court of appeals rejected petitioner's alternative theory, concluding that petitioner failed to establish that the acts at issue created a hostile work environment. Pet. App. A12.

Nothing in *Burlington Northern* calls into question the court of appeals' hostile work environment ruling. *Burlington Northern* addressed only the standard for proving retaliation; it did not address the standard for proving a hostile work environment. To the extent that petitioner seeks to challenge as inconsistent with *Burlington Northern* the district court's determinations on the alleged individual acts of retaliation, petitioner's decision not to challenge those findings on appeal pre-

cludes him from raising the issue for the first time in this Court. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (when an issue was neither properly presented nor passed on below, review should be denied); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001). Because nothing in the court of appeals' decision conflicts with *Burlington Northern*, and petitioner waived any contention that the district court's decision conflicts with *Burlington Northern*, review of petitioner's first question is not warranted.

2. The remaining questions that petitioner seeks to present concern case-specific issues that also do not warrant review. Petitioner argues (Pet. 11-21) that the courts below failed to apply or violated various precedents of this Court. But those arguments consist of nothing more than assertions that either the court of appeals or the district court did not consider or did not properly weigh particular pieces of evidence. Such fact-bound assertions clearly do not warrant review.

Petitioner also contends (Pet. 25-30) that the district court exhibited bias in failing to allow additional discovery. As the court of appeals explained, however, the district court did not abuse its discretion in declining to extend the discovery deadline when the primary basis for doing so would have been that petitioner's former counsel was negligent in failing to conduct discovery. Pet. App. A8. Petitioner points to no evidence that the district court was biased against him in making that ruling, and, as Judge Rogers explained, petitioner has failed to show that he was unfairly prejudiced by the district court's discovery ruling. *Id.* at A16-A17. In any event, that fact-bound question does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2006